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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

URBAN ASSOCIATES, INC.,  
a Michigan corporation,

Plaintiff,

-vs-

STANDEX ELECTRONICS, INC.  
a Delaware corporation, and STANDEX  
INTERNATIONAL CORP., a Delaware  
corporation, jointly and severally,

Defendants.

Case No. 4:04-cv-40059-PVG-VMM

Hon. Mark A. Goldsmith

Stephen K. Valentine, Jr. (P21697)  
Victoria A. Valentine (P58546)  
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**URBAN ASSOCIATES, INC.'S MOTION TO VACATE OPINIONS/ORDERS AND THE APRIL  
14, 2011 "FINAL AWARD" ISSUED BY THE MAJORITY ARBITRATORS**

**CONCURRENCE**

Pursuant to Local Rule 7.1(a), on June 24 and June 30 2011, Victoria A. Valentine  
contacted Defendant's counsel, Michael Barton, to determine whether Defendant would concur  
with or oppose the instant motion. Defendant's counsel did not concur and the relief sought in  
said motion was not obtained.

**MOTION**

NOW COMES Plaintiff, Urban Associates, Inc., by and through its attorneys, Valentine & Associates, P.C., and, pursuant to 9 U.S.C. §10, moves this Honorable Court to Vacate the Opinions/Order and the 4/14/11 "Final Award" issued by the Majority Arbitrators (Majority) and in support thereof states as follows:

1. The Federal Arbitration Act (FAA) (9 U.S.C. §§1-14) provides for the vacation of an award under certain circumstances.

2. The relevant portions of FAA §10 states:

Section 10. Same; vacation; grounds; rehearing.

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration –

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators. (9 U.S.C. §10).

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1  
2 3. The terms of the Stipulated Order for Arbitration provides that the arbitrators are  
3 to be bound under the law of the case doctrine, by the Court of Appeals opinion in this case, and  
4 by the recommendation of the Magistrate Judge denying Urban's motion for summary  
5 judgment. (See, Ex. 6: Stipulated Order for Arbitration attached to the accompanying brief in  
6 support).

7  
8 4. The Majority:

9 (I) *failed to abide by the law of the case;*

10 (II) *were guilty of misconduct by depriving Urban of a fundamentally fair*  
11 *hearing.*

12 (III) *exceeded their powers and/or so imperfectly executed them that a mutual,*  
13 *final and definite award upon the subject matter submitted was not made;*

14 (IV) *acted with a manifest disregard of the law;*

15 (V) *failed to render an award in conformity with the evidence presented in the*  
16 *hearing;*

17 (VI) *refused to hear evidence pertinent and material to the controversy; and*

18 (VII) *exhibited evident partiality.*

19 Pursuant to 9 U.S.C. §10 and based on the facts and law contained in the accompanying  
20 Brief in Support of Motion to Vacate Opinions/Order and 4/14/11 "Final Award" Issued by the  
21 Majority Arbitrators, this Honorable Court should vacate the Opinions/Orders and the 4/14/11  
22 "Final Award" issued by the Majority.  
23

24 Further, based on the evidence in the record, this Court should enter an order awarding  
25 Urban life of part/life of product commissions on the relevant parts as presented in the  
26 arbitration proceeds and order an accounting and payment of those commissions.  
27  
28

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Alternatively, this Court should remand this matter for arbitration proceedings before a new arbitration panel.

Respectfully submitted,

VALENTINE & ASSOCIATES, P.C.

By: /s/Victoria A. Valentine  
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Dated: July 6, 2011

I hereby certified that on July 6, 2011, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send notification of such filing to the following:

Valentine & Associates, P.C.:	<a href="mailto:valulaw@ameritech.net">valulaw@ameritech.net</a>
Michael J. Barton:	<a href="mailto:mbarton@plunkettcooney.com">mbarton@plunkettcooney.com</a>

Dated: July 6, 2011

/s/Victoria A. Valentine  
Victoria A. Valentine (P58546)  
Attorney for Plaintiff

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**PLAINTIFF, URBAN ASSOCIATES, INC.'S, BRIEF IN SUPPORT OF ITS  
MOTION TO VACATE OPINIONS/ORDERS AND THE APRIL 14, 2011 "FINAL AWARD"  
ISSUED BY THE MAJORITY ARBITRATORS**

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**CERTIFICATE OF SERVICE**

I hereby certified that on July 6, 2011, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send notification of such filing to the following:

Valentine & Associates, P.C.:	valulaw@ameritech.net
Michael J. Barton:	mbarton@plunkettcooney.com

Dated July 6, 2011	<u>/s/Victoria A. Valentine</u> Victoria A. Valentine (P58546)
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**STATEMENT OF ISSUES PRESENTED**

Whether this court must vacate the arbitration award pursuant to 9 u.s.c. §10 where the Majority Arbitrators failed to abide by the law of the case.

Plaintiff says: Yes.  
Defendant says: No.

II. Whether this court must vacate the arbitration award pursuant to 9 u.s.c. §10 where the Majority Arbitrators were guilty of misconduct by depriving Plaintiff of a fundamentally fair hearing.

Plaintiff says: Yes.  
Defendant says: No.

III. Whether this court must vacate the arbitration award pursuant to 9 u.s.c. §10 where the Majority Arbitrators exceeded their powers and/or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.

Plaintiff says: Yes.  
Defendant says: No.

IV. Whether this court must vacate the arbitration award pursuant to 9 u.s.c. §10 where the Majority Arbitrators acted with a manifest disregard of the law.

Plaintiff says: Yes.  
Defendant says: No.

V. Whether this court must vacate the arbitration award pursuant to 9 u.s.c. §10 where the Majority Arbitrators failed to render an award in conformity with the evidence presented in the hearing.

Plaintiff says: Yes.  
Defendant says: No.

VI. Whether this court must vacate the arbitration award pursuant to 9 u.s.c. §10 where the Majority Arbitrators refused to hear evidence pertinent and material to the controversy.

Plaintiff says: Yes.  
Defendant says: No.



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VII. Whether this court must vacate the arbitration award pursuant to 9 u.s.c. §10 where the Majority Arbitrators exhibited evident partiality.

Plaintiff says: Yes.  
Defendant says: No.

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INDEX OF CONTROLLING AUTHORITY

COURT RULES:

- 9 U.S.C. §10
- 9 U.S.C. §12
- 9 U.S.C. §§1-14 (cited in accompanying Motion to Vacate)

CASES CITED:

- Amway Global v. Woodward*, 744 F. Supp 2d 657 (E.D. Mich. 2010)
- Beacon Journal Publishing Company v. Akron Newspaper Guild, Local Number 7*, 114 F. 3d 596 (6th Cir. 1997)
- Benedict v. U.S.*, 822 F. 2d 1426 (6<sup>th</sup> Cir. 1987)
- Coe v. Suburban Light & Power Co.*, 167 N.E. 693 (Ohio Ct. App. 1929)
- Coffee Beanery, Ltd. v. WW, LLC*, 300 Fed. Appx. 415 (6th Cir. 2008) [Appendix A]
- Grand Rapids Die Casting v. Local Union No. 159*, 684 F. 2d 413 (6<sup>th</sup> Cir. 1992)
- Hall Street Assoc., LLC v. Mattel, Inc.* 552 U.S. 576 (2008)
- HMC Management Corp. v. Carpenters Dist. Council*, 750 F. 2d 1302 (5<sup>th</sup> Cir. 1985)
- Hoteles Condado Beach, La Concha and Convention Ctr. v. Union de Tronquistas Local 901*, 763 F. 2d 34 (1<sup>st</sup> Cir. 1985)
- Jacada, Ltd. v. International Marketing Strategies*, 401 F. 3d 701 (6th Cir. 2005), abrogated on other grounds, 522 U.S. 576 (2008).
- Martin Marietta Materials v. Bank of Okla*, 304 Fed. Appx. 360 (6<sup>th</sup> Cir. 2008) [Appendix B]
- Matteson v Ryder Sys*, 99 F.3d 108 (3<sup>rd</sup> Cir. 1996)
- Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros*, 70 F. 3d 418 (6<sup>th</sup> Cir. 1995)
- Nat'l Renal Alliance, LLC v. GAIA Healthcare Systems, LLC*, 2011 U.S. Dist. LEXIS 10808 (M.D. Tenn. 2011) [Appendix C]
- Salei v. Shearson Lehman Bros.*, 1996 U.S. Dist. LEXIS 7620 (E.D. Mich. 1996) [Appendix D]

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2 *Siegal v. Titan Indus. Corp.*, 779 F. 2d 891 (2<sup>nd</sup> Cir. 1985)  
3 *Solvay Pharms., Inc. v. Duramed Pharms., Inc.*, 442 F. 3d 471 (6th Cir. 2006)  
4 *Stolt-Nielson S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758 (2010)  
5 *Terry Barr Sales Agency, Inc. v. All-Lock Company, Inc.*, 96 F. 3d 174 (6<sup>th</sup> Cir. 1996)  
6 *The Thomas Kinkade Company, Inc. v. Lighthouse Galleries, LLC*, 2010 U.S. Dist. LEXIS 6443 (E.D.  
7 Mich. 2010) [Appendix E]  
8 *Urban Assoc. Inc. v. Standex Elec. Inc.*, 2006 U.S. Dist. LEXIS 3502 (E.D. Mich. 2006)  
9 *Urban Assoc. Inc. v. Standex Elec. Inc.*, 216 Fed. Appx. 495 (6<sup>th</sup> Cir. 2007)  
10 *Wold Architects & Engineers v. Strat*, 474 Mich. 223(2006)  
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## I. INTRODUCTION - FUNDAMENTAL FAIRNESS?

To encourage parties to agree to arbitration in the first place, the FAA ensures that "arbitration awards are both fair and final." *Solvay Pharms., Inc. v. Duramed Pharms., Inc.*, 442 F.3d 471, 475 (6th Cir. 2006). The act promotes finality "by substantially limiting the occasions for judicial review," *id.*, and expressing "a presumption that arbitration awards will be confirmed." *Andersons, Inc. v. Horton Farms, Inc.*, 166 F.3d 308, 328 (6th Cir. 1998). **At the same time, however, fairness is achieved "by requiring courts to intervene when arbitrators so improperly execute their responsibilities as to discourage others from arbitrating in the future." *Solvay*, 442 F.3d at 475.** *The Thomas Kinkade Company, Inc. v Lighthouse Galleries, LLC*, 2010 U.S. Dist. LEXIS 6443 \*17 (E.D. Mich. 2010). (Emphasis ours).

"Effusively deferential language notwithstanding, courts are neither entitled nor encouraged simply to "rubber stamp" the interpretations and decisions of Arbitrators...Courts still maintain a significant role in the...arbitration process..." *Matteson v. Ryder Sys*, 99 F. 3d 108, 114 (3<sup>rd</sup> Cir. 1996). "The great deference afforded arbitration awards is not the equivalent of a grant of limitless power." *Matteson, supra*.

As our United States Supreme Court recently held, "[i]t is when an arbitrator strays from interpretation and application of the agreement and effectively dispense[s] his own brand of industrial justice that his decision may be unenforceable." *Stolt-Nielson S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1767 (2010) quoting *Major League Baseball Players Assn v. Garvey*, 532 U.S. 504 (2001).

In *Beacon Journal Publishing Company v. Akron Newspaper Guild, Local Number 7*, 114 F. 3d 596 (6<sup>th</sup> Cir. 1997)<sup>1</sup>, the Court stated that "judges and arbitrators are mandated to respect the agreement the parties have reached." *Beacon, supra* at 600. There, the Court found "the

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<sup>1</sup> Labor-Arbitration cases govern disputes under the Federal Arbitration Act (FAA). *Martin Marietta Materials v. Bank of Okla*, 304 Fed. Appx. 360 (6<sup>th</sup> Cir. 2008); *Solvay, supra* at 476.

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1 arbitrator imposed his own brand of 'industrial justice' in this case by crafting guidelines that  
2 do not even arguably derive themselves from the contract." *Beacon, supra*. In vacating the  
3 arbitrators' award, the Court held that "[t]he arbitrators' decision violates the very touchstone  
4 of arbitration – that the award 'draw its essence' from the...agreement." *Beacon, supra* at 600.  
5 "[A]n arbitrator does not have unfettered discretion and when he or she departs even from  
6 arguably construing the contract, this court must vacate the award." *Beacon, supra*.  
7  
8

9 An arbitrator fails to draw its essence from the agreement when:

10 (1) it conflicts with express terms of the agreement; (2) it imposes  
11 additional requirements not expressly provided for in the agreement; (3) it  
12 is not rationally supported by or derived from the agreement; or (4) it is  
13 based on "general considerations of fairness and equity" instead of the  
14 exact terms of the agreement. *Solvay, supra* at 476 quoting *Beacon Journal*  
15 *Pub.*, 114 F. 3d at 600).

16 See also, *HMC Management Corp. v. Carpenters Dist. Council*, 750 F. 2d 1302 (5<sup>th</sup> Cir. 1985)

17 (Court vacated an arbitration award because the arbitrator's opinion was based on his sense of  
18 what was improper behavior); *Grand Rapids Die Casting v. Local Union No. 159*, 684 F. 2d 413  
19 (6<sup>th</sup> Cir. 1992) (arbitrator improperly substituted his own provisions on discharge procedures in  
20 an agreement in place of those agreed upon by the parties); and *Jacada, Ltd. v. International*  
21 *Marketing Strategies*, 401 F. 3d 701, 712 (6<sup>th</sup> Cir. 2005), abrogated on other grounds, 522 U.S.  
22 576 (2008), (the Court reiterated that "[a]n arbitrator's award is to draw its essence from the  
23 agreement and it is not merely his own brand of industrial justice.")

24 Pursuant to 9 U.S.C. §10(a), this Court may vacate an arbitration award:

25 (1) where the award was procured by corruption, fraud, or undue means;

26 (2) where there was evident partiality or corruption in the arbitrators, or  
27 either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. 9 U.S.C. §10(a). (See also, *Kinkade, supra* \*17). (Emphasis ours).

The Sixth Circuit also recognizes judicial intervention is appropriate where the arbitrators have acted with manifest disregard for the law. *Nat'l Renal Alliance, LLC v. GAIA Healthcare Systems, LLC*, 2011 U.S. Dist. LEXIS 10808 (M.D. Tenn. 2011).<sup>2</sup>

Manifest disregard of the law is found where, "the arbitrator understood and correctly stated the law but proceeded to ignore it." *Siegal v. Titan Indus. Corp.*, 779 F. 2d 891 (2<sup>nd</sup> Cir. 1985). The award "must fly in the face of legal precedent." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros*, 70 F. 3d 418, 412 (6<sup>th</sup> Cir. 1995). "The arbitrators act in manifest disregard if (1) the applicable legal principle is clearly defined and (2) the arbitrator refused to heed that legal principle." *Jacada, supra*.

Here, the award must be vacated because the Majority Arbitrators (Majority):

- (I) failed to abide by the law of the case;
- (II) were guilty of misconduct by depriving Urban of a fundamentally fair hearing.
- (III) exceeded their powers and/or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made;

<sup>2</sup> The Sixth Circuit Court of Appeals, as well as this Eastern District, continue to employ this manifest disregard of the law standard, even after the United States Supreme Court case of *Hall Street Assoc., LLC v. Mattel, Inc.* 552 U.S. 576 (2008). See, *Coffee Beanery, Ltd. v. WW, LLC*, 300 Fed. Appx. 415, 419 (6<sup>th</sup> Cir. 2008); *Amway Global v. Woodward*, 744 F. Supp 2<sup>nd</sup> 657 (E.D. Mich. 2010); *Kinkade, supra*.

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- (IV) *acted with a manifest disregard of the law;*
- (V) *failed to render an award in conformity with the evidence presented in the hearing;*
- (VI) *refused to hear evidence pertinent and material to the controversy; and*
- (VII) *exhibited evident partiality.*

Although just one of the errors committed by the Majority is sufficient to be a basis for vacation of the award, it is the entirety of these proceedings that thoroughly contaminated this arbitration. Throughout these entire proceedings, the Majority ignored the mandate from the Court of Appeals (COA) and kept redefining their own invented definition of the key term in this case: **"orders booked,"** during which time Urban encountered roadblock after roadblock because the invented definition was continually altered. This ever-changing definition included invented terms not found in the agreement, e.g., "binding releases," "long-term agreements" and "fixed term requirements contract," among others, which also directly contradicted the COA mandate. Because this invented definition does not emanate from the evidence and objective testimony, it must have come from the Majority's own preconceived views and opinions, including the "testimony" of Arbitrator Rustmann, Standex's party-appointed non-neutral arbitrator. The contamination continued when the Majority: failed to admit pertinent and relevant evidence; failed to follow its own rulings; and when Arbitrator Rustmann took control of these proceedings and essentially "testified" as to the pivotal definition of "orders booked."

The ultimate definition of "orders booked," as defined and redefined by Arbitrator Rustmann and adopted by the Majority was at complete odds with the definitions given by

1 objective evidence and witnesses, including Standex's Mr. Anderson, the officer in charge of  
2 Urban's relationship with Standex.

## 3 II. FACTUAL BACKGROUND

### 4 A. STANDEX'S AGREEMENT:

5 In 1990, Plaintiff, Urban's, predecessor and Defendant, Standex, entered into a sales  
6 representative agreement (SRA) that was drafted by Standex's Vice-President, Charles  
7 Johnson. Paragraph 10 of the Agreement, the paragraph at issue, provides, in pertinent part,  
8 as follows:

9 Upon termination by the company, commissions shall be paid on all  
10 orders booked by the Representative and received by the Company in  
11 house prior to an including the termination date. No commissions shall  
12 be paid to the Representative for orders booked by the Representative  
13 and/or received by the Company after the termination date.... (Ex. 1:  
14 SRA, ¶10). (Emphasis ours).

15 Mr. Johnson admitted that:

- 16
- 17 • the "orders booked" paragraph is ambiguous (Ex. 2: 3/23/09 Tr., pp. 131-132);
  - 18 • when drafting this paragraph he most likely pulled it out of another document (Ex. 2:  
19 3/23/09 Tr., p. 131);
  - 20 • he had no conversation with Urban about his definition of "orders booked" (Ex. 2: 3/23/09  
21 Tr., pp. 129-130; 143);
  - 22 • he did nothing to assure that both Urban and Standex were on the same "wavelength" as  
23 to the meaning of "orders booked" (Ex. 2: 3/23/09 Tr., pp. 129-130 and 143);
  - 24 • "orders booked is not synonymous with shipping release or shipment order or release  
25 order" (Ex 2: 3/23/09 Tr., pp 130-131); and
  - 26 • *most importantly*, he never discussed Standex's interpretation of the meaning of "orders  
27 booked" with Urban(Ex. 2: 3/23/09 Tr., p 106).
- 28



Johnson also testified that when he drafted the Agreement he intended "orders booked" to mean that Urban would be paid commission for as long as that purchase order lasted." (Ex. 2: 3/23/09 Tr., pp. 104-105).<sup>3</sup>

After years of securing millions of dollars in business for Standex, Standex terminated Urban, but not before Standex conveniently made arrangements to secretly hire Urban's key employee, Denise Falzon. Thereafter, Standex refused to pay Urban all commissions owing for "orders booked" under the agreement Standex drafted.

**B. THE DISTRICT COURT WAS WRONG:**

Urban filed suit alleging, *inter alia*, breach of contract. Standex moved for summary judgment, seeking a dismissal of all counts of the complaint. The district court agreed with Standex and granted its motion.<sup>4</sup> (Ex 3: USDC Opinion).

Urban appealed and the COA reversed the dismissal of the breach of contract claim, finding the district court erred when it agreed with Standex. (Ex. 4: COA Opinion (216 Fed. Appx. 495 (6<sup>th</sup> Cir. 2007))).

**C. MAGISTRATE:**

Based on the COA Opinion, Urban then filed a motion for summary judgment, which the Magistrate denied, holding that Urban have the opportunity at trial for a "reasonable fact

<sup>3</sup> Standex may claim that Johnson's testimony supports Rustmann's invented and ever-changing definition of "orders booked"; however, it must be remembered Johnson's subjective interpretation was admittedly never disclosed to Urban and is contrary to other testimony presented.

<sup>4</sup> *Urban Assoc. Inc. v. Standex Elec. Inc.*, 2006 U.S. Dist. LEXIS 3502 (E.D. Mich. 2006).

finder to determine which, if either, alternative interpretation the parties intended." (Ex. 5: USDC Magistrate Opinion, p. 5).

#### D. ARBITRATION:

On 2/25/08, the parties entered into a Stipulated Order for Arbitration (Ex 6) and ultimately arbitrators were chosen consisting of: The Hon. Robert Webster, former Oakland County Circuit Court Judge (Neutral Arbitrator); Frederick Lauck (Urban's Party-Appointed Arbitrator); and Daniel Rustmann (Standex's Party-Appointed Arbitrator) (Ex. 6).

The Arbitration Agreement provides in pertinent part as follows:

5. The Arbitrators are to receive and be bound by the Court of Appeals opinion in this case and the recommendation of the magistrate denying Urban's motion for summary judgment under the law of the case doctrine. (Ex. 6, p. 3, ¶15).

On 3/23/09, before the arbitration proceedings began, Arbitrators Webster and Rustmann made comments essentially to the effect that ..."Judge Gadola [the USDC Judge] got it right"; meaning that – despite the COA's ruling – they opined that the Agreement relating to "orders booked" was unambiguous.

After the initial hearing, on 3/23/09 through 3/25/09, the Majority issued their first opinion, dated 5/11/09, which created a new definition of "orders booked," unsupported by the objective evidence and that contravened the COA's mandate.<sup>5</sup> The Majority found:

...that Plaintiff, Urban, is entitled to post termination commissions only on any **binding** releases issued prior to termination for shipment subsequent to termination or on **any long term agreement (fixed term requirements contracts)** procured by Plaintiff prior to termination, the

<sup>5</sup> The only Standex witnesses who had any familiarity with the term "orders booked" were Standex Vice Presidents, Johnson and Anderson. Neither gave any objective evidence supporting the Majority's constantly changing definitions. This will be more fully set forth *infra*.

1 term of which extended past termination of Plaintiff ("Allowed  
2 Commissions"). (Ex. 7, p. 2). (Emphasis ours).

3 The Majority ordered an evidentiary hearing on Urban's proof of unpaid Allowed  
4 Commissions. At the evidentiary hearing, Arbitrator Rustmann continued to redefine and  
5 recreate his invented term "orders booked":  
6

7 ARBITRATOR RUSTMAN: I mean, the blankets could be terminated at  
8 any time and there was no obligation to buy anything...there was no  
9 evidence that there was any obligation to issue any releases against a  
blanket purchase order.

10 What I was talking about was it is an exclusive contract, we are going to  
11 buy all of our requirements of X number of parts from you for this year,  
12 and then there is a binding commitment to buy whatever our  
requirements are of those contracts. (Ex. 8: 5/20/09 Tr., p. 25).

13 A Scheduling Order, dated 6/2/09 (Ex. 9), was then issued ordering further briefing on  
14 liability under the newly defined "orders booked." Urban was ordered to only bullet point  
15 evidence (Ex. 8: 5/20/09 Tr., p. 106) establishing "a prima facie basis for each contract claimed  
16 and shall indicate if it desires production of additional documents from defendant." (Ex. 9, pp.  
17 1-2).

18 Urban complied by filing a bullet point brief; and, because of Arbitrator Rustmann's  
19 changing definition of "orders booked," it attached the affidavit of its expert rebuttal witness.<sup>6</sup>  
20 (Ex. 10).

21 On 11/9/09, contrary to the Majority's promises and representations made at the  
22 5/20/09 hearing, another Opinion was issued without hearing or testimony. This Opinion once  
23  
24  
25

26  
27 <sup>6</sup> The Majority did not allow the testimony of the rebuttal expert nor did it accept the affidavit  
28 as an exhibit.

1 more redefined and changed the definition of "orders booked"; and, in effect, denied Urban  
2 the right to present relevant evidence in support of its position. (Ex. 11).

3  
4 This time the Majority again raised the bar, changed the proof Urban needed to  
5 establish liability, and again contravened the COA Opinion. Their revised definition now added  
6 the new and additional requisite – *that the long term agreement be binding* and ordered another  
7 evidentiary hearing on liability relating only to two TRW parts. (Arb. Lauck dissent). (Ex. 11, p.  
8 2).

9  
10 Urban filed a Motion for Correction of Errors and/or Reconsideration and for a Full  
11 Hearing. This motion was heard on 4/14/10 and was later denied. (Ex. 12).

12 Evidentiary hearings on liability on only these two TRW parts were held on 9/9/09-  
13 9/10/10 and 1/11/11-1/12/11. Thereafter, the Majority issued their "Final Award," dated 4/14/11  
14 (Ex. 13) (Lauck dissenting).

15  
16 Urban now, pursuant to 9 U.S.C. §§10 and 12, files this Motion to Vacate this 4/14/11  
17 Final Award, as well as the other Orders/Opinions issued by the Majority.

### 18 **III. ARGUMENT**

#### 19 **A. THE LAW OF THE CASE:**

20 The COA reversed the district court's grant of Standex's Motion for Summary  
21 Judgment and dismissal of Urban's breach of contract claim<sup>7</sup> for the very same errors the  
22 Majority commit here. The COA found:

23  
24 Paragraph 10 does not define "**orders booked**" nor does it place any  
25 temporal limit on how long Standex must pay commission for such  
26 "orders booked." (Ex. 4, p. 15)....

27  
28 <sup>7</sup> It affirmed the summary judgment on other causes of action.

No other provisions of the agreement shed any light on what the parties meant by ¶10's "orders booked." (Ex. 4, p. 17). (Emphasis ours).

In granting Standex's summary disposition, the district court erred by adopting the same position Standex argues here: that "orders booked" meant an enforceable obligation, a shipment order or release order. In agreeing with Standex, the district court had held:

Here, the term "orders booked" is not susceptible to two or more reasonable interpretations. It is unreasonable to assume that Plaintiff would be due commissions on "orders" that would not create an enforceable obligation on the part of the customer to purchase the products ordered. See *Hudson v. Tektronix, Inc.*, 1982 Ohio App. LEXIS 12909 (Ohio Ct. App. 1982) (unpublished); *Chicago Fineblanking Corp. v. D.J. Cotter & Co.*, 1996 U.S. Dist. LEXIS 21882 (E.D. Mich. 1996) (unpublished). Plaintiff seems to argue that the Agreement vests commissions through a blanket purchase order, which commissions later become due when a shipment order is made by the customer....

Defendants owed commissions to Plaintiff for the "orders booked" that resulted in the obligation on the part of the customer to purchase the product so ordered. That obligation arose through the a [sic] customer's shipment or release order, which, when combined with the terms of the blanket purchase order against which it was made, would determine the obligations of the contracting parties and the commissions due Plaintiff. (Ex. 3, pp. 7-8). (Emphasis ours).

In reversing, the COA spent 14 pages explaining the district court's error (which are essentially some of the errors of the Majority) in adopting Standex's position. It found, contrary to the district court's opinion, that:

- (1) extrinsic evidence supported Urban's claim that "life of the part" commissions was the industry norm after termination absent a contractual provision or post termination negotiations to the contrary [the understanding stated not only by Urban's expert, but also by Mr. Anderson, Standex's Vice President. (Ex. 14: 9/9/10 Tr., pp. 66-67)];
- (2) the district court's reference to ¶7 of the agreement was misplaced since it was ¶10, not ¶7, that related to post termination commissions;
- (3) the district court made reference to a "shipment [order] or release order despite the fact that the agreement never used those terms";

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(4) the district court had assumed that Urban's right to commission depended on the issuance of an order that obligated the customer to purchase a certain *quantity of Standex's product, despite the fact that the Agreement contained no such requirement and that* there was no evidence that this was the nature of the blanket Purchase Orders or requirements contracts used in the auto industry in Michigan at that time; and

(5) refuted the district court's reliance on *Hudson v. Tektronix*, 1982 Ohio App. LEXIS 12902 (Ohio Ct. App. 1982), indicating that *Hudson* is a case with facts dissimilar to those here. (Ex. 4, pp. 11-12).

After delineating the above-shortcomings of the district court, the COA rejected Standex's claim and affirmatively held that "where ¶7 ("Commissions") conflicts with ¶10 ("Termination") as to post termination commissions, ¶10 must prevail as a matter of law." (Ex. 4, p. 17). And, specifically when construing ¶10, the COA disagreed with the district court's adoption of Standex's position and ruled as follows:

Reading the agreement as a whole and considering all the extrinsic evidence, a reasonable factfinder could conclude that the parties intended Urban to receive post-termination commissions at least for the life of the POs that were received prior to the termination date. Indeed, it might be difficult for a factfinder to conclude that the parties did *not* intend the agreement to give Urban a right to commissions at least for the life of the purchase order – the very Standex official who drafted the agreement testified that he understood the agreement to guarantee commissions to the extent. (Ex. 4, p. 22). (Emphasis in original).

It also held:

Lastly, Standex drafted the agreement. If Standex wished to limit post-termination commissions to products shipped before termination, it could have made that clear in ¶10. Similarly, if Standex wished to impose a temporal limit on post-termination commissions to products shipped before termination, it could have made that clear in ¶10.

But Standex used the term "orders booked" instead of referring to "products shipped" or, "shipment releases," failed to define "orders booked," and failed to include a temporal limit on post-termination commissions. By these acts and omissions in drafting the agreement,

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Standex did nothing to dispel the impression that it intended to pay Urban post-termination commissions for the life of the PO [purchase order] (as Standex's own Vice-President intended) or (even for the life of the part (which Urban's expert testified was the default arrangement in the industry)). Standex thus cannot escape the long-settled principle of Ohio law that

every thing is to be taken most strongly against the party who prepared the contract - the one who, in the absence of proof to the contrary, created the doubt, which in this case is the defendant. He who speaks in a written contract prepared by himself should speak plainly and, failing to do so, must abide the natural and legal results of such failure.

*Coe v. Suburban Light & Power Co.*, 167 N.E. 693, 695 (Ohio Ct. App. 1929).

The district court erred in concluding that the term "orders booked" was not ambiguous, and Urban presented ample evidence from which a reasonable factfinder could adopt one of its two preferred interpretations of the term. (Ex. 4, pp. 22-23). (Emphasis ours).

The COA also cautioned Standex that "in disputes over interpretation of contract term where appellant's own testimony contradicts the position asserted by appellant's counsel in the brief, Statements of counsel do not constitute evidence." (Ex. 4, p. 21).

**B. THE MAJORITY DISREGARDED THE FACTS AND THE LAW, EXCEEDED THEIR POWERS, AND DEPRIVED PLAINTIFF OF A FUNDAMENTALLY FAIR HEARING:**

Here, the Stipulation and Order for Arbitration (Ex. 6) bound the arbitrators to the COA Opinion<sup>8</sup> and recommendation of the magistrate under the law of the case doctrine. (Ex. 6, ¶15). Accordingly, the COA mandated that this ambiguous contract be construed against Standex.

Arbitrator Rustmann, however, apparently thought otherwise:

---

<sup>8</sup> *Urban, supra*. (Hereinafter Urban or Standex).

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1  
2 ARBITRATOR RUSTMANN: "I don't think I am bound by a court of  
3 appeals dicta."<sup>9</sup> (Ex. 8: 5/20/09 Tr., p. 56)....

4 ARBITRATOR RUSTMANN: We already construed the unambiguous  
5 language of the contract and we already made a ruling that --(Ex. 15:  
6 9/10/10 Tr., p. 108). (Emphasis ours).

7 Arbitrator Rustmann's refusal continued:

8 ARBITRATOR RUSTMAN: I think the agreement, the language is  
9 unambiguous. I don't think it requires --

10 MR. VALENTINE: The reason we're here is it is ambiguous. (Ex. 16:  
11 1/11/11 Tr., pp. 44-45). (Emphasis ours).

12 The Majority disregarded the COA admonishment to the district court<sup>10</sup> for the latter's  
13 reference to and use of the terms "products shipped" and "shipment releases," and the right to  
14 commissions depended on issuance of an order that obligated the customer, even though  
15 Standex's agreement did not contain such terms. (Ex. 4, pp. 11-12). In the Rustmann-  
16 authored 5/11/09 Majority Opinion, he defined "orders booked" as "any binding releases issued  
17 prior to termination for shipment subsequent to term or on any long term agreement (fixed  
18 term requirements contracts)" (Ex 7).

19 Subsequently, at the 5/20/09 evidentiary hearing, Arbitrator Rustmann  
20 reinterpreted/reinvented/refabricated his 5/11/09, which was adopted by the Majority, again  
21 ignoring the COA mandate:

22  
23 <sup>9</sup> The quotations cited are rulings from the COA, which were necessary to determine the case  
24 and are not *dicta*. "*Dicta* is defined as: 'Statements and comments in an opinion concerning  
25 some rule of law or legal proposition not necessarily involved nor essential to determination of  
26 the case in hand....'". *Wold Architects & Engineers v. Strat*, 474 Mich. 223, 756 (2006).

27 <sup>10</sup> In reversing the district court, the COA stated that Standex used the term "orders booked"  
28 instead of referring to "products shipped" or "shipment releases," failed to define "orders  
booked" and failed to include a temporal limit on post-termination commissions. See Brief pp.  
11-12 *supra* quoting from the COA Opinion. (Ex. 4, pp 22-23).



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1 ARBITRATOR RUSTMAN: -- my intent was that blanket orders -- that in  
2 the context of blanket orders, that under the contract language of the  
3 rep contract, which my interpretation was that it required binding  
4 commitments to purchase for shipment of product into the territory.  
5 And that if there was just a blanket order without releases issued against  
6 it, that did not constitute a binding commitment to purchase for  
7 shipment into the territory...

8 ARBITRATOR RUSTMAN: And that it was only a binding commitment  
9 to the extent that there were binding releases that were issued against  
10 it. If there was a converse situation where there was a long-term  
11 agreement that said we are going to buy X parts for this year at X price  
12 and we are going to buy our entire requirements of them, not just what  
13 we say we want to buy by issuing releases, that's a different situation....

14 ARBITRATOR RUSTMAN: I mean, the blankets could be terminated at  
15 any time and there was no obligation to buy anything. There was no  
16 evidence that they were exclusive, there was no evidence that there was  
17 any obligation to issue any releases against a blanket purchase order.

18 What I was talking about was it is an exclusive contract, we are going to  
19 buy all of our requirements of X number of parts from you for this year,  
20 and then there is a binding commitment to buy whatever our  
21 requirements are of those contracts.

22 ARBITRATOR LAUCK: Are we interpreting what you meant? Is that what  
23 is going on?

24 ARBITRATOR RUSTMAN: That's what I meant by it.

25 ARBITRATOR LAUCK: I can't believe we are sitting here trying to  
26 interpret now what is the plain language of the opinion. Okay. (Ex. 8:  
27 5/20/09 Tr., pp. 24-26). (Emphasis ours).

28 After the 5/20/09 hearing, Arbitrator Rustmann issued another opinion (also adopted by  
the Majority) in which he again raised the bar and reinterpreted and redefined the term "orders  
booked," again ignoring the COA mandate. This time, he added the burden of establishing a  
"binding long-term agreement." (Arbitrator Lauck dissenting). (Ex. 11, p. 2).

1 And, besides failing to heed the COA direction regarding construing the contract  
2  
3 against Standex, the Majority did not follow the COA mandate that:

4 "In disputes over interpretation of contract terms where appellant's own  
5 testimony contradicts the position asserted by appellant's counsel in the  
6 brief, Statements of counsel do not constitute evidence." (Ex. 4, p. 21).

7 Here, Standex's own Vice Presidents, Johnson's and Anderson's, objective testimony  
8 contradicts Standex's position as set forth by its statements of counsel.

9 Johnson admitted he intended "orders booked" to mean that Urban would be paid  
10 commission for as long as that purchase order lasted." (Ex. 2: 3/23/09 Tr., pp. 104-105).<sup>11</sup> (See  
11 also, Brief pages 5-6 *supra*, which details Johnson's testimony that contradicts Standex's  
12 position.)

13 Anderson [Standex's Vice President], stated it was his understanding that Urban was  
14 entitled to life of part commissions and that the orders were "booked" when they were  
15 entered into Standex's computer system (Ex. 14: 9/9/10 Tr., pp. 66-67 and 69-70). (Emphasis  
16 ours).<sup>12</sup>

17  
18 **C. THE MAJORITY MUST HAVE FOCUSED ON ARBITRATOR RUSTMANN'S**  
19 **"TESTIMONY" AND NOT THE EVIDENCE:**

20 **i. The Majority's Invented Definition Completely Ignores the COA Mandate**  
21 **and Totally Disregards Submitted Objective Evidence And Testimony:**

22  
23 <sup>11</sup> Standex may claim that Johnson's testimony supports Rustmann's invented and ever-  
24 changing definition of "orders booked"; however, it must be remembered Johnson's subjective  
25 interpretation was admittedly never disclosed to Urban and is contrary to other testimony  
26 presented by Johnson, Anderson, Mathews, and Urban and other evidence that calls for the  
27 payment to Urban of commissions for the life of the part.

28 <sup>12</sup> This interpretation is consistent with Urban's expert's testimony and the industry default  
definition for post-termination commissions, which will be discussed *infra*.

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(a). Definition of "Orders Booked"

Anderson testified that an "order booked" was accomplished when the relevant information was put into the Standex system via a computer entry and other means identifying the representative who was to receive the commissions:

- Q. With regard to when an order came into Standex, can you please explain to me what the procedure is with regard to that?

A. Well, assuming the part number has been established, the order would be entered into the system...

Q. Okay. When an order is booked, the order is entered into the Standex computer system, and then coded with the sales commission code for the sales representative, is that what you just told us?

A. Yes. (Ex. 14: 9/9/09 Tr., pp. 69-70). (Emphasis ours).

- Q. So what is your understanding of what orders booked means?

A. Well, in the case of automotive it's tied to a part number. And the part number you can trace it...to the automotive platform and use platform...

Q. And, so, if Urban was to be paid commission on all orders booked...prior to and including the termination date, how long would he be entitled to post-termination commissions on orders booked?

A. It was my understanding, generally speaking, for the life of the part. (Ex. 14: 9/9/10 Tr., pp. 66-67). (Emphasis ours).

Anderson, also unequivocally testified that all parts on Exhibit 2 [the parts at issue] were booked by Urban. (Ex. 14: 9/9/10 Tr., pp. 99-100 and Ex. 17: 1/12/11 Tr., p. 14):

- "A. [MR. ANDERSON] [Exhibit 2] ...anybody who was familiar with the business would know that those part numbers were part numbers that were initiated by Urban on behalf of Standex....

Q And if these part numbers went to different customers, would Urban still be entitled to a commission on that business?

A Yes, they would. (Ex. 17: 1/12/11 Tr., pp. 10-11). (Emphasis ours)....

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Q [MS. VALENTINE] And these parts on Exhibit 2, these were all orders that were booked by Urban. Is that your testimony?

A [MR. ANDERSON] Yes, they were...." (Ex. 17: 1/12/11 Tr., p. 14). (Emphasis ours).

"[MR. ANDERSON] ...[T]hose [part numbers on Ex 2] are all Urban-specific generated part numbers for their customers." (Ex. 14: 9/9/10 Tr., pp. 99-100).

"A [MR. ANDERSON] Well, the automotive parts [on Ex 2] are unique to automotive...they are Urban-specific part numbers.

Q Okay. And would you agree that he should be paid commission until the part ends pursuant to this January 1st, 1990 agreement?

A I certainly believe so...." (Ex. 14: 9/9/10 Tr., p. 77). (Emphasis ours).

This testimony of Anderson regarding "life of part" and "orders booked" conforms with the industry default standard, as testified to by Urban and Urban's expert, Charles Mathews and as set forth in the law of the case. The industry standard regarding payment of post-termination commission to a manufacturer's representative where there is no limitation in an agreement is "[t]hat the rep gets paid for the life of the part." (Ex. 18: 3/24/09 Tr., pp. 163-165). This is especially relevant here since the COA found that "Standex...failed to include a temporal limit on post-termination commissions." (Ex. 4: COA, pp. 22-23). This is also in conformity with Urban's testimony that "[the standard] in the automotive [industry] is typically life of part." (Ex. 2: 3/23/09 Tr., pp. 26-27). "My understanding was we would be paid for the life of the programs that we had going, whether that be the part or purchase orders that they were in existence" (Ex. 2: 3/23/09 Tr., p. 26) and is recognized by the courts:

"Life of the part" commissions are apparently a fairly common practice in the manufacturer's representative business. As we explained in *Kingsley Assoc., Inc. v. Moll Plasticrafters, Inc.*, 65 F. 3d 498, 502 n 5 (6<sup>th</sup> Cir. 1995), sales representatives commonly insist on "life of part" provisions in agency

1  
2 contracts "because the sales representative must invest a great deal of  
3 time, effort, and money in securing an initial sale." However, after an  
4 initial sale is made, "the buyer may continue to use the part in the  
5 manufacture of is automobiles for many years." *Id. Terry Barr Sales*  
6 *Agency, Inc. v. All-Lock Company, Inc.*, 96 F. 3d 174, 177 (6<sup>th</sup> Cir. 1996).

7 Johnson, Anderson's predecessor, drafted the contract. Johnson admitted it was  
8 ambiguous and testified he did not discuss with Urban his intent, interpretation or meaning of  
9 the term "orders booked," which he pulled from other contracts. (Ex. 2: 3/23/09 Tr., p. 106).  
10 Johnson also admitted that his intent was for Urban to be paid a commission "for as long as  
11 that order, purchase order, lasted," (Ex. 2: 3/23/09 Tr., pp. 104-105), which he stated were  
12 "basically on an annual basis..." (Ex. 2: 3/23/09 Tr., pp. 105-106); but, if it was longer than  
13 annually, then for as long as it lasts. (Ex 2: 3/23/09 Tr., p. 104). And, Johnson stated that  
14 "orders booked is not synonymous with shipping release, shipping order or release order" (Ex  
15 2: 3/23/09 Tr., p. 132), and he also testified that prior to his departure from Standex business  
16 evolved into multi-year contracts:

17 Q [BY ARBITRATOR LAUCK] If you were chasing a piece of business, was  
18 it the object of Standex to be the supplier of that particular part identified  
19 by a number for as long as that part lasted?

20 A [BY JOHNSON] We would hope so, yes. (Ex. 2: 3/23/09 Tr., p. 104).

21 (b) Long-Term Contract:

22 Even under Arbitrator Rustmann's invented and changing definition of "orders  
23 booked," the Majority ignored the presented evidence and ultimately found that only two TRW  
24 orders satisfied its reinvented definition of LTA fixed term requirement contracts. This finding  
25 was contrary to the plethora of evidence Urban presented supporting the new Majority-  
26  
27  
28

reinvented definition of "orders booked" as being "long term agreement (fixed requirement contracts)." Urban presented the following requirements contracts and/or LTAs:

- Delphi Purchase Order dated 1/29/02, (which does not have an end date), for parts CB 1031700 & CT 1028900 specifically states it is a "**REQUIREMENTS CONTRACT FOR APPROXIMATELY 100% OF OUR PURCHASES.**" (Standex 00700-00705). (Ex. 19, pp. 2-7). (Emphasis ours).
- Delphi Purchase Order dated 1/30/02, (which does not have an end date), for parts CB 5015700C and CB 5015701C specifically states it is a "**REQUIREMENTS CONTRACT FOR APPROXIMATELY 100% OF OUR PURCHASES.**" (Standex 00781-00789). (Ex. 19, pp. 8-15). (Emphasis ours).
- ABC Group - "Subcontract Business Requirements" document specifically states it is a **long term commitment**. Urban attached an exhibit dated January 24, 2000, which is a letter to Standex's Linsley from Silvino Gatti, senior buyer of ABC Group. The letter specifically stated:

"Accompanying is a copy of the **ABC Group** of Companies Sub-Contractor **Business Requirements** package for your acceptance. Note that these terms are fairly standard for those companies supplying components within the Automotive Industry....

In keeping with ABC's **long term agreement commitments of the five year life of this program**, ABC Air Management Systems is committed to annual price reductions. We therefore ask your company to confirm acceptance of these requirements, both in achieving a yearly price reduction as well as meeting all of the outlined quality and delivery requirements." (Ex. 19, p. 1). (Emphasis ours).<sup>13</sup>

The evidence detailed above, which specifically states that such are **requirements contracts and/or long-term commitments**, was completely ignored by the Majority.

Despite the mandate from the COA, the Majority dispensed their "...own brand of industrial justice by creating additional requirements not found in the contract." (*Beacon, supra* at 600). In doing so, they were derelict in their duties and in their mission of interpreting

<sup>13</sup> Notwithstanding the fact that these orders constituted requirements contracts and/or LTAs, the acceptance of the requirements contracts by Standex was also previously presented, but ignored.

1 the ambiguous agreement and construing it against Standex, the drafter. Here are some, but  
2  
3 not all, of the deficiencies of the Majority:

- 4 • They ignored the credible, reliable and relevant testimony of Standex's own Anderson, who  
5 testified that Exhibit 2 constituted "orders booked" by Urban. (Ex 14: 9/9/10 Tr., pp. 77 and  
6 99-100 and Ex. 17: 1/12/11 Tr., pp. 10-11 and 14);
- 7 • They ignored the plethora of evidence and created a requirement of establishing long term  
8 agreements (fixed term requirements contract).
- 9 • They focused on the "testimony" of Standex's Arbitrator Rustmann, which included  
10 interpretations violating the COA mandate. These fatal errors certainly evidence how the  
11 Majority improperly executed their responsibilities, exceeded their powers, deprived Urban  
12 of a fundamentally fair hearing and acted in manifest disregard of the law by which they  
13 were bound.

12 (c). Arbitrator Rustmann The Witness?:

13 The Majority's changing definition, authored by Arbitrator Rustmann, runs afoul of the  
14 COA mandate, does not emanate from the contract language at issue or from the evidence  
15 and objective witness testimony presented. Rather, it must have come from his own  
16 "testimony" and from the Majority's preconceived bias. In essence, at the hearing, Arbitrator  
17 Rustmann "testified" as to his opinion and definition of "orders booked" and fabricated a  
18 definition of "orders booked":  
19

- 20 • ARBITRATOR RUSTMAN: My question, though, has been from day one; is  
21 there a binding commitment to purchase for shipment into their territory? If  
22 the LTA [long-term agreement] ended, then it goes on a terminable PO and it is  
23 no longer a binding commitment.

24 MS. VALENTINE: Well, that's your testimony, Dan.

25 ARBITRATOR RUSTMAN: That's not my testimony. That's my position.

26 MS. VALENTINE: There's not one witness who testified — ....(Ex. 16: 1/11/11 Tr.,  
27 pp. 30-31). (Emphasis ours).  
28



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1  
2 • ARBITRATOR RUSTMANN: I have some knowledge of the industry. I know  
3 blanket purchase orders can be issued in different forms. Some will say  
4 you're going to supply our entire requirements of this part as long as this  
5 purchase order issued and some are more indefinite in terms of – (Ex. 2: 3/23/09  
6 Tr., p. 53). (Emphasis ours).

7 • ARBITRATOR RUSTMANN: ...and I know there are different types of purchase  
8 orders that can be issued. (Ex. 2: 3/23/09 Tr., p. 54). (Emphasis ours).

9 • ARBITRATOR RUSTMANN: I know that purchase order is generally issue [sic]  
10 at some point. I mean you'll get like a letter – a sourcing that says okay you've  
11 got the award and then the purchase order is generally issued sometime later in  
12 the process. But it's that sourcing award letter that's really oh we've got the  
13 business in my experience? (Ex. 2: 3/23/09 Tr., p. 63). (Emphasis ours).

14 • ARBITRATOR RUSTMANN: I've seen different scenarios of different purchase  
15 orders. I've seen purchase orders that are requirements contracts that say  
16 you are the sole source and I shall buy 100 percent of my requirements of this  
17 from you and then releases are issued and every time I've seen it the customer  
18 reserves the right to terminate for convenience and is only bound to releases  
19 that were actually issued.

20 MS. VALENTINE: I've never seen a one that says for convenience. I've seen  
21 them where they've said for something else, failure.

22 ARBITRATOR RUSTMANN: They all say for convenience. Every contract in the  
23 auto industry said we can terminate this for convenience and if we do our  
24 only obligation is to buy eight weeks' worth of releases from you.

25 MR. VALENTINE: You know, we don't have that in this case, Dan, and that's  
26 not part of the evidence that's here. (Ex. 20: 3/25/09 Tr., pp. 264-267).  
27 (Emphasis ours).

28 • ARBITRATOR RUSTMAN: ...Now, I'm an automotive attorney. I litigate the  
issue all the time. I cannot take one of these contracts on behalf of a supplier  
and such the purchaser and say, "You have to purchase this from me, you  
cannot terminate it," unless it was for a fixed term, which is what Johnson  
described was the prior arrangement. There used to be a one-year contract  
where it said, "purchase my requirements for this one-year." (Ex. 21: 4/14/10  
Tr., pp. 25-26). (Emphasis ours).

And, even during the testimony of Standex's own Johnson, the drafter of the  
agreement, Arbitrator Rustmann "testified." This time he duplicitously planted the concept of



1 long-term agreements (LTA) into the proceeding and into the definition of "orders booked,"  
2 even though Johnson testified he was not involved in any LTA while at Standex:

3  
4 [RUSTMANN] Do you remember any times in the later years, I know you  
5 were only there until 01, but were you ever involved – would Standex ever  
6 get involved in an LTA or LSA, long-term agreement that after the release  
7 system went in?

8 [JOHNSON] Not to my knowledge, I don't know whether they do or not, I  
9 don't stay in touch....

10 **ARBITRATOR RUSTMANN:** I guess maybe it's different in different types  
11 of parts, but I'm familiar with some circumstances where, for example,  
12 the customer will say, you know, or the manufacturer will go on and say,  
13 Jeez, I've got to put a one much [sic] of front-end costs on this I got to buy  
14 all different kinds of capital equipment and unless you commit to give me  
15 the orders for a period of two years or three years, I'm not going to invest  
16 that capital. So then you would negotiate a long-term agreement that  
17 would say okay this is the price and this is going to be it for three years and  
18 then you come back and negotiate it again.

19 MS. VALENTINE: Is that a question? (Ex. 2: 3/23/09 Trans, pp. 121-122).  
20 (Emphasis ours).

21 **D. THE EXCLUDED EVIDENCE:**

22 (i). Law:

23 "Vacatur is appropriate when the exclusion of relevant evidence 'so affects the rights of  
24 a party that it may be said that he was deprived of a fair hearing.'" *Hoteles Condado Beach, La*  
25 *Concha and Convention Ctr. v. Union de Tronquistas Local 901*, 763 F. 2d 34, 39-40 (1<sup>st</sup> Cir. 1985).  
26 This is because "the arbitrator is not bound to hear all of the evidence tendered by the parties;  
27 however, he must give each of the parties to the dispute an adequate opportunity to  
28 present its evidence and arguments." *Id.* at 39. *Salei v. Shearson Lehman Bros.*, 1996 U.S.  
Dist. LEXIS 7620 \*13 (E.D. Mich. 1996). (Emphasis ours).

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(ii). The Majority Failed To Follow Their Own Procedures:

(a). Summary Judgment:

At the 5/20/09 evidentiary hearing, Arbitrators Rustmann and Webster:

(1) confirmed on the record that Urban would not be foreclosed from having a subsequent hearing or from presenting evidence on the Rustmann-invented-issue of long-term agreements; and

(2) reassured Urban that summary disposition would not be granted on this issue. In fact, Arbitrator Rustmann specifically instructed Urban to only "bullet point" (Ex. 8: Trans 5/20/09, p. 106) documents that demonstrated an LTA and indicated that after submission, "we may order additional documents to be produced." (Ex. 8: 5/20/09 Tr., p. 102).

Once Standex's counsel indicated he may attempt to get a summary disposition, Urban's counsel indicated they did not want to proceed on that basis and give up the right to a hearing, which would include the ability to examine witnesses and representatives of suppliers. After having previously been foreclosed from presenting evidence setting forth its case as directed in the 5/11/09 Majority Opinion (Ex. 7) or Arbitration Agreement (Ex. 6), Urban's counsel tried to present a method of proceeding within those confines:

MR. VALENTINE: My understanding is that we are going to go through, identify the relevant parts, and we are going to put together the documentation with regard to those. We are going to establish from our contention [sic] standpoint fixed term requirement agreements, and try to quantify it, and try to give the panel the claimed commissions on that.

ARBITRATOR WEBSTER: Yeah.

MR. VALENTINE: My understanding is that Mike is going to take a look at that, and he is going to say, yeah, nay, or maybe. I think it is going to be nay, and then we are going to have the hearings and evidentiary hearings with regard to narrowing it down so that the panel can make its decision. Have I got it right?

MR. BARTON: My brief, though, I can I [sic] request if I don't think there's a fact question on any of them, that the panel rules as a matter of law with

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2 respect to some of the blankets. And the panel will make a decision on  
the other ones.

3  
4 ARBITRATOR WEBSTER: Right.

5 ARBITRATOR RUSTMANN: And if there are issues regarding  
6 documents such as you say, here is my documents that I have that  
7 show me this is a long-term fixed requirements contract, but I need  
8 more to prove my case in that, then say that, and, you know, we may  
9 order additional documents produced.

10 MS. VALENTINE: I wouldn't have to say that until -- if he says something.  
11 That's why I don't want to foreclose myself from having somebody  
12 come in and testify to it. I just don't see how you can do this.

13 ARBITRATOR WEBSTER: You are not foreclosing [sic].

14 MS. VALENTINE: Okay. So it is not --

15 ARBITRATOR WEBSTER: We, as Stephen said, are trying to narrow it  
16 down, make it simple.

17 ARBITRATOR RUSTMANN: It is kind of like an offer of proof, I guess.

18 MS. VALENTINE: Okay. (Ex. 8: 5/20/09 Tr., pp. 101-102). (Emphasis ours).

19 Yet, despite these assurances and the wealth of evidence establishing the existence of  
20 long-term agreements with numerous customers (including, but not limited to, ASMO, ABC,  
21 Delphi and TRW), which was cited in Urban's brief, the Marjority denied Urban the opportunity  
22 to present relevant evidence. On November 9, 2009, the Majority ruled that Urban was ONLY  
23 allowed to proceed on two parts for TRW:

24 3. Decided that the only contract that could potentially be deemed to be  
25 a "long term agreement (fixed term requirement contract)" under the  
26 panels' prior order was the TRW contract regarding Part Nos. 152943-1  
27 and 152944-1, and the panel will conduct another evidentiary hearing to  
28 accept further proofs with respect to the negotiations and Purchase Order  
for these two TRW parts only, to decide if a binding long term agreement  
for these two parts was in fact entered into, and, if so, whether any post

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1  
2 termination commissions are owing with respect to these two TRW parts  
3 (Arbitrator Lauck dissenting). (Ex. 11, p. 2). (Emphasis ours).

4 This 11/09/09 Opinion is another example of the Majority's failure to follow its own  
5 rulings; this Opinion:

- 6 • completely ignored the Majority's previous instruction to submit only "bullet point  
7 evidence;"
- 8 • completely ignored the extensive evidence set forth in Urban's brief establishing other  
9 customer's LTAs;
- 10 • totally foreclosed Urban from presenting evidence and testimony on the issue of LTAs; and
- 11 • deprived Urban of its right to a fundamentally fair hearing on the issues.

12 **(b). Rebuttal Expert:**

13 An understanding of the automotive industry, its terms and the workings of this  
14 specialized field was imperative to the administration of justice in this case, especially since the  
15 definition of "orders booked" kept changing and the bar Urban needed to establish liability  
16 kept rising. To assist with these issues, on 9/25/09, Urban attached to its brief the Affidavit of  
17 Expert Peter Rosenfeld (Ex. 10), who Urban intended to call as an expert rebuttal witness and  
18 who was part of the White House Automotive Task Force. Standex, however, moved to strike  
19 this expert. There was never any argument that Mr. Rosenfeld was unqualified as an expert;  
20 yet, on 11/9/09, the Majority "[d]ecided that Defendant's Motion to Strike new Unlisted  
21 Witness (Rosenfeld) is Granted (Arbitrator Lauck dissenting.)" (Ex. 11). The Majority made this  
22 ruling contrary to:

- 23
- 24
- 25 ■ Mr. Rosenfeld's expert opinion, which essentially refuted Arbitrator Rustmann's  
26 "testimony" and definition and redefinition of "orders booked";
- 27
- 28

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- 2     ▪ the plain language of the stipulation of the parties which specifically allows a party to call
- 3     "unanticipated rebuttal witnesses to the extent authorized by FRCP and federal rules of
- 4     evidence"; (Ex. 6, ¶8)
- 5     ▪ Urban's Expert Witness List dated March 9, 2005, which specifically states: "Any and all
- 6     necessary rebuttal experts."; (ii) Urban's First Supplemental Witness List and Expert
- 7     Witness List dated May 14, 2005 specifically states: "Any and all necessary rebuttal
- 8     expert(s);" and
- 9     ▪ the legal authority that states "[T]he fact that it [evidence] might have been offered in
- 10    chief does not preclude its admission in rebuttal." *Benedict v. U.S.*, 822 F. 2d 1426, 1428
- 11    (6<sup>th</sup> Cir. 1987) quoting *Martin v. Weaver*, 666 F. 2d 1013 (6<sup>th</sup> Cir. 1981). "[T]he plaintiff has
- 12    no duty to anticipate or to negate a defense theory in Plaintiff's case-in-chief." *Benedict*,
- 13    *supra*.

11                   (c).     **Deprived Discovery:**

12           Throughout the proceeding, the Majority not only condoned Standex's failure to

13    provide all of the required information, but again failed to follow their own Orders.

14           Urban raised the issue of Standex's failure to produce discovery on many occasions,

15    including in Urban's counsel's letter of 12/28/10. (Ex. 22). At the 1/11/11 hearing, this latest

16    issue of discovery was raised as a result of **Standex's attorney ADMITTING** in letters dated

17    12/20/10 and 12/22/10 to Urban's counsel **that Standex had not provided all of the**

18    **DISCOVERY INFORMATION** it was required to provide relating to sales to China on the TRW

19    long-term agreement at issue. (Ex. 23 and 24). Throughout the proceedings, Urban sought

20    continuing sales information from Standex, including, but not limited to, TRW sales. Standex's

21    admission was in VIOLATION OF INTERROGATORIES IT SIGNED IN THIS MATTER and the

22    STIPULATION TO ARBITRATE, which required that "Standex shall continue to provide Urban

23    

24    

25    

26    

27    

28

1 with all supplemental sales information on the parts at issue including the parts listed in the  
2 subsequent paragraph which information may also be used." (Ex. 6).<sup>14</sup>

3  
4 When Standex's violation of the Stipulation was brought to the Panel's attention at the  
5 1/11/11 hearing, the Panel subsequently ruled that Standex was required to produce all of the  
6 discovery information with regard to the TRW business.

7  
8 ARBITRATOR WEBSTER: I just raised a question. Why don't we make a  
9 special record of the damages that are at issue here, the China -- I'll call  
10 them China damages -- and just have that there for appellate purposes. I  
11 mean, this obviously is going to go somewhere.

12 MR. BARTON: Sure.

13 ARBITRATOR WEBSTER: So why don't you do that.

14 ARBITRATOR LAUCK: Not a summary. Give them the documents that  
15 you have to show the sales.

16 MR. BARTON: I'll give it to them, if that's the ruling of the panel.

17 ARBITRATOR WEBSTER: I think just so it's there, and if we're wrong, why,  
18 you've got it.

19 ARBITRATOR RUSTMANN: Just submit it to the panel.

20 MR. BARTON: Yes, copies of them.

21 ARBITRATOR LAUCK: And to opposing counsel.

22 MR. BARTON: Yes.

23 ARBITRATOR WEBSTER: And again, if there's some objection to what  
24 he's submitted, why, we'll hear that. (Ex. 17: 1/12/11 Tr., pp. 49-50).  
25 (Emphasis ours).

26  
27 <sup>14</sup> In addition, pursuant to the Stipulation to Arbitrate, ¶12, these are parts that Standex was  
28 specifically required to provide additional discovery information.

1 On or about 1/14/11, however, Standex's unilaterally decided to produce sales figures  
2 without any backup of any kind as required by the Panel. Standex provided no supporting  
3 Purchase Orders, invoices, shipping releases, emails, Global Supply Agreement, Long Term  
4 Agreements and any other documents that show the specifics of the sales at issue.  
5

6 On 2/24/11, Arbitrator Rustmann, again took control and deemed sufficient the  
7 produced summary of China sales. (Ex. 25; Lauck Dissenting). The latest ruling completely  
8 contradicted the Panel's earlier ruling at the 1/12/11 hearing, which required Standex to  
9 produce all the "China" sales documents, not just a summary. (Ex. 17: 1/12/11 Tr., pp. 49-50).  
10 And, once again, Standex's got away with a blatant and total disregard for this Panel's ruling,  
11 the Federal Rules of Civil Procedure, answers to interrogatories and Stipulation to Arbitrate,  
12 etc. The supporting sales information was essential to Urban's claim, as limited by the  
13 Majority.  
14

15  
16 **E. PREDISPOSED ARBITRATORS**

17 The parties agreed that this arbitration would be by a panel of three arbitrators, with  
18 each party choosing a non-neutral arbitrator and a neutral being seated. Yet, the proceedings  
19 in this case have not been fair or neutral.  
20

21 Early in the proceedings, a statement was made by the Majority to the effect that  
22 despite the ruling of the COA the trial court got it right when it ruled as it did. This statement  
23 was made prior to the proofs being presented and shows a prejudgment by those Arbitrators  
24 that would deprive Urban of a fair and unbiased arbitration proceeding. The Majority's  
25 determination that the Agreement was unambiguous establishes prejudice.  
26

27 Arbitrator Webster stated on the record to Urban's counsel that:  
28

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2 ARBITRATOR WEBSTER: You stipulated that we did not have to give you  
3 a reason for award, that might have been a dangerous thing. (Ex. 20:  
3/25/09 Tr., p. 276).

4 Indeed, it was a very dangerous thing. It is clear the rules of law were not followed and  
5 the Majority "imposed their own brand of industrial justice."

6 Arbitrator Rustmann not only took control over these proceedings; he also "testified,"  
7 drafted the Opinions (a task that, in the undersigned's experience, has been done by the  
8 neutral); and kept redefining and reinterpreting his own invented definitions.  
9

10 It is more than clear that Arbitrator Rustmann authored the issued opinions.

- 11
- 12 • ARBITRATOR RUSTMANN: And you can smirk at me, Ms. Valentine, but I am telling  
13 you what my intent was in my order, and you are quibbling with me over the intent of  
14 language I wrote. And I am telling you what my intent was. I am not going to sit here  
15 and listen to days of testimony on blanket purchase orders that I don't consider to be  
16 long-term agreements, fixed term requirements contracts. (Ex. 8: 5/20/09 Tr., p. 53).  
(Emphasis ours).

17 Arbitrator Rustmann also made the following statements on the record:

- 18 • "[W]hat I ordered . . ." (Ex. 8: 5/20/09 Tr., p. 46). (Emphasis ours).
- 19 • "I mean, that was not my intent in the order..." (Ex. 8: 5/20/09 Tr., p. 46). (Emphasis  
20 ours).
- 21 • "[M]y interpretation . . ." (Ex. 8: 5/20/09 Tr., p. 47). (Emphasis ours).
- 22 • "this is what my basis of my order was when I signed off on the order. That's my  
23 intent" (Ex. 8: 5/20/09 Tr., p. 49). (Emphasis ours).
- 24 • "I thought that it was pretty clearly expressed in my opinion that I wrote here." (Ex. 8:  
25 5/20/09 Tr., p. 50). (Emphasis ours).
- 26 • "So my interpretation, and I wrote the language, I mean, that was my decision to  
27 put into the order the language that said fixed term agreements, long-term  
28 agreements, fixed term requirements contracts. I did not understand that the  
blanket orders were, based on this testimony, long-term agreements. And I was  
looking for the testimony -- I remember asking Mr. Urban, were there any long-term



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agreements that were binding that were for a fixed term? And I think he said, I don't know, I don't think so. But I have to check. **That's why I put that in.** If there were, then he is entitled to commissions on them. These types of orders that we are seeing that were testified to where there was a blanket purchase order and a release are not, **in my opinion**, long-term agreements fixed term requirement contracts." (Ex. 8: 5/20/09 Tr., pp. 52-53). (Emphasis ours).

- "I've been writing the opinions for the majority." (Ex. 21: 4/14/10 Tr., p. 34). (Emphasis ours).

With the atmosphere created by the Majority, fairness could never be achieved.

#### IV. CONCLUSION AND RELIEF REQUESTED

Pursuant to 9 U.S.C. §10 and based on the facts and law contained in this Brief this Honorable Court should vacate the Opinions/Orders and the 4/14/11 "Final Award" issued by the Majority.

Further, based on the evidence in the record, this Court should enter an order awarding Plaintiff life of part/life of product commissions on the relevant parts as presented in the arbitration proceedings and order an accounting and payment of those commissions.

Alternatively, this Court should remand this matter for arbitration proceedings before a new arbitration panel.

Respectfully submitted,

VALENTINE & ASSOCIATES, P.C.

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